

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
THEODORE EPSTEIN,

Appellant,

V.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-107

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a cancellation of a permit for ground water appropriation near Patterson, Washington, came on for hearing before the Pollution Control Hearings Board, Wick Dufford, Lawyer Member and Gayle Rothrock, Presiding Officer, at Yakima, Washington, on August 29, 1985. Lawrence J. Faulk has read the record and thus is participating in this decision. Pursuant to RCW 43.21B.230, respondent public agency elected to have a formal hearing. Janet Neer of R. H. Lewis and Associates, court reporters, recorded the proceedings.

1 Appellant appeared only through his attorney, Crane Bergdahl of
2 Pasco. Respondent WDOE appeared through its Assistant Attorney
3 General, Allen T. Miller, Jr.

4 A witness was sworn and testified. Exhibits were admitted and
5 examined. Argument was heard. From the testimony, evidence, and
6 contentions of the parties the Board makes these

7 FINDINGS OF FACT

8 I

9 The matter on appeal arises in south central Washington as a
10 result of the failure over several years to bring water to use on 320
11 acres of undeveloped dry land owned by Epstein near Patterson at the
12 edge of Horse Heaven Hills and the Columbia River.

13 II

14 The State Department of Ecology (WDOE), the water appropriation
15 authority, did not extend a fourth time the time period allowed for
16 bringing water to use on the Epstein property. As the grantor of
17 water appropriation permits, the WDOE administers the Water Code,
18 including the cancellation of permits and the relinquishment of
19 certificated water rights when there has been no beneficial use of
20 water for a period of time.

21 III

22 On April 11, 1978, WDOE issued a permit for ground water
23 appropriation from a well on the subject property which authorized
24 withdrawal of 1,216 acre-feet per year, at not to exceed 2,500 gallons
25 per minute, for irrigation of crops from March 1 to November 1, each

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1 year in the West 1/2, Section 15, T. 6N., R. 26 E.W.M. The initially
2 contemplated development program was to install a pump in a well 18
3 inches in diameter, to deliver water to the acreage through solid set
4 sprinklers. This program was to have commenced in April of 1979, been
5 completed in April, 1980, and have the water brought to full use by
6 April 1981. This well was constructed in May 1979, but nothing
7 further was done to perfect an appropriation.

8 An investor group including appellant Epstein purchased the
9 property in February of 1980 and the permit was assigned to Epstein at
10 the time of purchase.

11 The permit was issued as a Family Farm Permit and requires the
12 land being irrigated under that authorization to remain in conformance
13 with the statutory definition of such a farm.

14 IV

15 In June of 1981, appellant, through his attorney, applied for an
16 extension of the time necessary to bring water to use in a farming
17 operation since he hoped to commence operations in 1982. An extension
18 was granted by WDOE through its Central Regional Office.

19 V

20 Again, in April 1982, appellant requested an extension due to
21 "recent economic conditions" which had prevented completion of the
22 project. He expressed hopes of completing the project before the end
23 of 1982. An extension was granted to April 1983, to put water to full
24 beneficial use.

1 VI

2 In a January 1983 communication to the WDOE appellant's attorney
3 advised that the new target date for operation was to be early 1984.
4 The WDOE in March 1983 receded from its requirement to have water put
5 to full use by April 1983 and granted an extension by which time all
6 facilities for the distribution of water were to be installed by
7 April 1, 1984.

8 VII

9 Additional communications between WDOE and other representatives
10 for appellant occurred in late winter 1984. Representations were made
11 that adverse economic conditions were holding up development and
12 another one-year extension was needed. It was also noted they desired
13 to use permit water on adjacent lands, thereby involving the
14 transaction of a change in place of water use. Another one-year
15 extension was granted.

16 VIII

17 In April 1985 an extension was again applied for by appellant.
18 WDOE said a construction plan must be presented. An agency
19 investigation of the 320 acre-site found no physical evidence of any
20 work toward applying water to the land, beyond the well construction
21 completed in the Spring of 1979. No construction plan was presented
22 and the WDOE regional office recommended denial of an extension.

23 IX

24 On May 16, 1985, the WDOE issued an order denying an extension of
25 construction period and cancelling the permit (No. G4-25483P) after

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1 evaluation of the record and files of the stressed water situation in
2 that Horse Heaven Hills area.

3 X

4 WDOE is currently conducting a study of declines in ground water
5 in the sparsely-vegetated Horse Heaven Hills and Lower Columbia River
6 Basin. New applications for water appropriation permits are in
7 abeyance pending results of the study. No adjacent landowners have
8 applied for permits recently.

9 XI

10 From the cancellation order of WDOE, appellant Epstein, through
11 his attorney, appealed to this Board on June 17, 1985. - It was
12 assigned the cause number PCHB 85-107 and it came to formal hearing
13 ten weeks thereafter.

14 XII

15 Appellant's argument is that adverse economic conditions have made
16 completion of any irrigation project impractical. Continued efforts
17 have been made to market the property on the basis of various
18 development proposals. None of these has panned out.

19 XIII

20 Any Conclusion of Law which is deemed a Finding of Fact is hereby
21 adopted as such.

22 From these Findings of Fact, the Board comes to these

23 CONCLUSIONS OF LAW

24 I

25 The Board has jurisdiction over these persons and these matters.

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Chapter 43.21B, 90.03, and 90.54 RCW.

II

The state water statutes require that waters appropriated be put to beneficial use, and so maintained, to achieve sound water resources management in the public interest. RCW 90.03.010; RCW 90.54.020, RCW 90.14.180.

III

RCW 90.03.320 provides direct guidance on bringing water to full use.

Actual construction work shall be commenced on any project for which permit has been granted within such reasonable time as shall be prescribed by the supervisor of water resources, and shall thereafter be prosecuted with diligence and completed within the time prescribed by the supervisor. The supervisor, in fixing the time for the commencement of the work, or for the completion thereof and the application of the water to the beneficial use prescribed in the permit, shall take into consideration the cost and magnitude of the project and the engineering and physical features to be encountered, and shall allow such time as shall be reasonable and just under the conditions then existing, having due regard for the public welfare and public interests affected: and, for good cause shown, he shall extend the time or times fixed as aforesaid, and shall grant such further period or periods as may be reasonably necessary, having due regard to the good faith of the applicant and the public interests affected. If the terms of the permit or extension thereof, are not complied with the supervisor shall give notice by registered mail that such permit will be canceled unless the holders thereof shall show cause within sixty days why the same should not be so canceled.

In the instant case seven years have elapsed since the permit was issued. Five years have elapsed since the change of ownership. Appellant Epstein or his agents have failed to engage in actual

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1 construction to bring waterworks to completion so as to begin to put
2 water to irrigation use on a family farm, as required by permit
3 G4-25483P. We conclude that DOE's cancellation here conformed with
4 RCW 90.03.320.

5 IV

6 Appellant asserts that the lack of physical works should not
7 determine due diligence issue. Emphasis is laid on the owners'
8 efforts to find a buyer who would develop the acreage. .

9 What is a reasonable time for perfection of a right may be
10 extended by economic, financial or legal difficulties or by natural
11 calamities in a proper case. However, no further extension is called
12 for in this case. The Board knows only that appellant has not been
13 able to make a sale of the property sufficiently attractive to himself
14 or his investor group. This falls far short of excusing the failure
15 to do any thing at all to apply water to the land for five years.

16 There is no contention that the original construction schedule was
17 unreasonable. On top of this four year-long extensions have been
18 granted. Nothing in the record indicates that this project is either
19 of unusual comparative costs or of unusual magnitude. Moreover,
20 appellant has shown no inability to complete the work, merely a
21 reluctance to do so based on his analysis of the likely economic
22 returns. This is not, we conclude, due diligence.

23 It is not permissible under the State Water Code to tie up or
24 reserve water, a public resource, merely in the hopes of coming upon
25 better economic times. Undeveloped waters should be returned to the

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1 public.

2 Ground and surface waters in stressed areas may be best left in
3 natural position in fulfillment of the public interest. RCW
4 90.54.040. If natural or economic circumstances change in the Lower
5 Columbia Basin, there may be renewed opportunities for irrigated
6 development in the future which can be evaluated through studies and
7 individual applications for water appropriation. We conclude nothing
8 in law or fact, based on the evidence presented in this case, compels
9 the extension of the development period and the vitality of Permit No.
10 G4-25483P itself.

11 V

12 Any Finding of Fact which is deemed a Conclusion of Law is hereby
13 adopted as such.

14 From these Conclusions of Law the Board enters this
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ORDER

The cancellation of Ground Water Permit No. G4-25483P is affirmed.
DONE this 10th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

Gayle Bothrock
GAYLE BOTHROCK, Vice Chairman

Wick Dufford
WICK DUFFORD, Lawyer Member

Lawrence V. Faulk 10/9/85
LAWRENCE V. FAULK, Chairman